United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 18, 1996

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

NORTH AVENUE NOVELTIES, INCORPORATED,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 95-2474
CITY OF CHICAGO, an Illinois municipal corporation,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 92 C 7203

Harry D. Leinenweber, *Judge*.

ORDER

On consideration of the petition for rehearing filed by the plaintiff-appellant on July 15, 1996, all of the judges on the panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 95-2474

United States Court of Appeals

For the Seventh Circuit

NORTH AVENUE NOVELTIES, INC.

Plaintiff-Appellant,

vs.

CITY OF CHICAGO, an Illinois municipal corporation,

Defendant-Appellee.

Before CUMMINGS, BAUER and KANNE, Circuit Judges.

CUMMINGS, Circuit Judge.

Plaintiff North Avenue Novelties, Inc. ("Novelties") seeks a declaratory judgment that the provisions of the Chicago Zoning Ordinance specifying the location of "adult uses" in Chicago are unconstitutional. For the following reasons, we affirm the district court's conclusion that the ordinance is not unconstitutional.

I.

It is helpful to begin by examining the overall scheme of the Chicago Zoning Ordinance. Decades ago, the City of Chicago was divided into Residential Districts, Business Districts, Commercial Districts, and Manufacturing Districts. The ordinance was subsequently amended to

create a fifth type: Planned Manufacturing Districts ("PMDs"). Like any zoning scheme, the purpose of these divisions was to ensure conformity in the types of buildings and activities that comprise each area, and to achieve this result the Chicago Municipal Code outlines the specific "permitted uses" and "special uses" for each district. Any use that is not specifically listed is prohibited. See *Williams v. City of Bloomington*, 108 Ill. App. 2d 307, 311, 247 N.E.2d 446, 449 (4th Dist. 1969).

In 1992, the City of Chicago amended the Zoning Ordinance to limit the location of adult uses. It did so in two ways. First, it designated adult uses as special uses only for Commercial and Manufacturing Districts.[1] Second, it dictated that adult uses are only permitted if they are located at least 1,000 feet from (a) any existing adult use; (b) any existing school or place of worship; and (c) any district zoned for residential use. *Chicago, Ill. Municipal Code* §§ 17-9.32(B)(6) & 17-9.3-3(A)(4) (1992).

Novelties opened its bookstore in 1992 at 1308 W. North Avenue in Chicago. Given the sexual character of its products, the bookstore easily qualified as an "adult use" under the ordinance. However, the bookstore's location is such that it fails both adult use requirements. It is not within a Commercial or Manufacturing District, but is located in a PMD known as the "Elston Corridor PMD." And it is only 825 feet from a Residential District. Thus Novelties is precluded from operating the bookstore at its

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[1]Originally, adult uses were only "special uses" in General Commercial Districts (C2-1 to C2-5) and Commercial-Manufacturing Districts (C3-1 to C3-7). However, amendments in 1993 and 1994 expanded the area to encompass all Commercial Districts and Manufacturing Districts.

current location.

II.

As in any case, we must initially determine whether this dispute is properly before us. Although the district court concluded that the adult use provisions of the Chicago Zoning Ordinance were not unconstitutional, it initially held that Novelties lacked standing to assert its claim. This conclusion was based upon the fact that commercial and retail businesses adult or otherwise are not permitted to operate in PMD areas. See *Chicago, Ill. Municipal Code* §§ 17, Part F, ch. 10.3-1 (permitted uses) & 10.4-1 (special uses).[2] As a result, the court decided that a determination that the specific adult use provisions were unconstitutional would not change Novelties' position because the provisions prohibiting commercial operations in PMDs would still preclude the bookstore's operation.

We recently addressed a similar situation in *Harp Advertising Illinois v. Village of Chicago Ridge, Ill.*, 9 F.3d 1290 (7th Cir. 1993). In Harp, an advertising company wanted to erect a billboard in Chicago Ridge, Illinois, but the village's zoning code prohibited all off-premises signs. The company brought suit alleging that the zoning code violated the First Amendment. That code was not the only ordinance in play, however, for the village's sign code prohibited all signs with faces exceeding 200 square feet, which the plaintiff's sign did. Because the plaintiff did not

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[2]The regulations for the Elston Corridor PMD are the same as those governing an M1-3 Restricted Manufacturing District. However, despite this fact, adult uses are not permitted anywhere within the PMD because the amendment that allowed adult uses in MI-3 districts specifically stated that it did not apply to PMDs.

contest the validity of the sign ordinance, we held that it had no standing to challenge the zoning ordinance. We noted that one of the essential elements of standing is redressability: a favorable decision of the court must redress the plaintiff's injury. *Id.* at 1292 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560, 112 S.Ct. 2130, 2135-36, 119 L.Ed.2d 351). Holding that the zoning ordinance was unconstitutional would not have changed the plaintiff's position because its sign would still have been precluded by another, valid, existing ordinance.

Harp is similar to our case in that another zoning provision also precludes adult book stores in Novelties' area: The ordinance prohibits all commercial activity, without regard to sexually explicit nature, in PMD areas. Thus the court below was correct that if one were to simply delete the adult use provisions from the ordinance, the PMD provisions would still remain to preclude Novelties' operation. However, the distinguishing factor between our case and *Harp* is that, unlike the plaintiff in *Harp*, Novelties challenges the PMD provisions of the ordinance as well as the adult use provisions, although admittedly it didn't spell this out in its complaint as clearly as it could have.

Novelties concedes that the City of Chicago is lawfully permitted under its police power to prohibit commercial and retail operations in areas, like the area here, that have been designated only for manufacturing and industrial business. See *Cosmopolitan Nat'l Bank v. County of Cook*, 103 I11. 2d 302, 310, 82 Ill. Dec. 649, 653, 469 N.E.2d 183, 187 (1984). However, Novelties challenges Chicago's overall scheme of limiting adult uses to certain specified areas. In essence, this is a facial attack on the ordinance because Novelties alleges that it unconstitutionally limits the total amount of sexually explicit speech. In making this

challenge, Novelties necessarily contends that the PMD provisions contribute to the overall speech restriction. One must only set forth in a complaint a "short and plain statement of the claim" in federal court, Fed. R. Civ. P. 8(a)(2), and "unlike insurance contracts, complaints are construed favorably to their drafters." *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). It would make little sense to read Novelties' complaint so strictly that it had fully conceded that some provisions of Chicago's Zoning Ordinance could preclude its operation such that it had no case. We conclude that we have jurisdiction to resolve Novelties' claim.

III.

Many municipalities have attempted to lessen the "secondary effects" of adult establishments by controlling their locations. The Chicago Zoning Ordinance is typical in this regard: It does not prohibit sexually explicit expression, but merely requires that such expression take place only in specified areas, and only in a non-concentrated manner. Such restrictions are viewed as content-neutral "time, place, and manner regulations," and are constitutional so long as they are "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29. As with any restriction on speech, the government bears the burden of justifying the regulation. See, *e.g.*, *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388; *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1552 (7th Cir. 1986), aff'd, 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972.

Novelties does not disagree with the City of Chicago's

substantial interest in regulating the location of sexually explicit materials; it contends only that the ordinance fails to leave open sufficient alternate communication avenues. It recognizes that the Supreme Court has previously upheld very similar zoning schemes: One which dispersed adult uses by requiring that they be 1,000 feet from each other, see *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, and one that concentrated them by requiring that they be 1,000 feet from residential areas, schools, and places of worship, see *Renton*, *supra*. Novelties contends, however, that while both of these schemes may have been constitutional in their respective cities, the Chicago Zoning Ordinance violates the First Amendment by merging the strategies and applying them to Chicago. We agree that the holdings of *Young* and *Renton* cannot merely be "combined" to conclude that the Chicago zoning scheme is necessarily constitutional; instead the scheme, as it is applied to Chicago's geographic area, must be considered.

In *Young*, the plurality focused on the fact that the ordinance at issue did not "deny [distributors of sexually explicit materials] access to the market or [render] the viewing public . . . unable to satisfy its appetite for sexually explicit fare." *Young*, 427 U.S. at 62, 96 S.Ct. at 2448. Justice Powell agreed and stated that the "primary concern of the free speech guarantee is that there be full opportunity for expression in all its varied forms to convey a desired message [and] that there be full opportunity for everyone to receive the message." *Id.* at 76, 96 S.Ct. at 2455 (J. Powell, concurring). Thus in analyzing Chicago's scheme, it is necessary to focus both on the ability of producers as a group to provide sexually explicit expression, as well as on the ability of the public as a whole to receive it.

Both parties used experts to evaluate the available

locations for adult uses under the ordinance. Edwin Thomas, a professor of quantitative geography, testified for Novelties, and Thomas Smith, Director of Planning and Development, testified for Chicago. Using the most expansive definition of "school" and "place of worship" possible, Professor Thomas concluded that the zoning ordinance left available roughly 270 acres, in various locations, or less than one percent of the land within Chicago's city limits. Mr. Smith's calculations led to figures for land available for adult use ranging from one percent to three percent. Novelties' entire argument rests upon comparing Thomas' figures with the figures relating to the ordinances at issue in other adult use zoning cases. It notes that the Chicago figures represent smaller acreage than that in Renton, Washington: Chicago would have to set aside for adult uses 5 percent of its land to be equivalent based on total acreage, or make 16,602 acres available to be equivalent based on population. See *Renton, supra*. And to equal the percentages of available land in Los Angeles, Chicago would need to provide roughly 3,637 acres (compared by land) or 5,943 acres (compared by population) for adult uses. See *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993)(affirming grant of preliminary injunction against ordinance's application to adult uses). Because Chicago's ordinance sets aside a lesser amount of space for adult uses than other cities, argues Novelties, its scheme is unconstitutional.

The district court properly dismissed these comparisons by noting that the amount of acreage, standing alone, is largely irrelevant. The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a "reasonable opportunity" to disseminate the speech at issue. *Renton*, 475 U.S. at 52, 106 S.Ct. at 931; *Young*, 427 U.S.

at 71, 96 S.Ct. at 2452-53. Requiring a "reasonable opportunity" in each region can, and most likely does, result in vastly different acreage percentages. But those differences in no way imply that the regions with lower percentages are acting unconstitutionally.

With reasonable opportunity as the proper focus, the relevant evidence was as follows: There are currently 35 adult uses within Chicago's city limits. Thomas testified that numerous adult use sites were available when Novelties opened for business. He further testified that between 22 and 56 locations (depending upon precisely where adult uses would actually open) are available for new adult uses. The Chicago Zoning Administrator testified that his office receives only about 4 or 5 inquiries per year concerning possible adult use locations. There was no evidence that any person has attempted to open an adult use, but was prevented from doing so by Chicago's ordinance. From this it is clear that the zoning scheme has not lessened the ability of producers of sexually explicit materials to find legal locations throughout Chicago to sell their product. Moreover, there is no indication that the Chicago population is having any difficulty receiving this product. Therefore, the Chicago Zoning Ordinance provides for sufficient alternate channels of communication for sexually explicit materials and is not unconstitutional.

IV.

For the foregoing reasons, the district court's judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC.; and HAROLD GERSTEIN,	)	
Plaintiffs-Appellants,	)	Case No. 92 C 7023
vs.	)	
CITY OF CHICAGO, an Illinois municipal corporation,	)	Judge Leinenweber
Defendant-Appellee.	)	

NOTICE OF APPEAL

Notice is hereby given that both Plaintiffs, North Avenue Novelties, Inc. and Harold Gerstein, hereby appeal to the United States Court of Appeals for the Seventh Circuit from a final judgment entered in this action on the 19th day of June, 1995. The Plaintiffs appeal from all aspects of that judgment.

Michael Null /s/
Attorney for Plaintiffs

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United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

NORTH AVENUE NOVELTIES INC.,
and HAROLD GERSTEIN

-V-

CITY OF CHICAGO, ILLINOIS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92 C 7023

Decision by Court. This action came to trial before the Court. The issues have been tried and decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the defendant counter-plaintiff City of Chicago and against the plaintiffs counter-defendants North Avenue Novelties, Inc. and Harold Gerstein in the amount of $210,250.00 plus costs of suit.

June 19, 1995

H. Stuart Cunningham
Clerk

Wanda Farber /s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC., and HAROLD GERSTEIN,	)	
	)	No. 92 C 7023
Plaintiffs and Counter-Defendants,	)	
	)	
v.	)	Judge
CITY OF CHICAGO,	)	Leinenweber
	)	
Defendant and Counter-Plaintiff.	)	

ORDER

This matter, having been tried before this Court, the parties having presented evidence at trial and submitting briefs and joint stipulations of fact, the Court being fully advised, and the Court having issued a comprehensive written ruling on May 5, 1995,

THE COURT HEREBY MAKES THE FOLLOWING FINDINGS:

1. Plaintiffs North Avenue Novelties and Harold Gerstein (collectively referred to as "Novelties") have filed a First Amended Complaint seeking declaratory and injunctive relief. In their complaint, Novelties challenges the constitutionality of the City of Chicago's ("City's") adult use provisions (codified in Chicago Municipal Code, §§ 16-16-050, 17-9.3-2, 17-9.3-3). Novelties contends that the adult use provisions in effect in 1992 violate the First and Fourteenth Amendments to the United States Constitution

because they fail to provide sufficient alternative avenues of communication.

2. The City denies the allegations in the complaint. Pursuant to this Court's supplemental jurisdiction under 28 U.S.C. § 1367, the City has filed a five-count amended counterclaim ("counterclaim"). Count I seeks declaratory and injunctive relief for Novelties' continuous violation of the amended adult use provisions, which are not challenged in this lawsuit. Count II seeks civil penalties for each day Novelties operated in violation of the amended adult use provisions. Count III seeks declaratory and injunctive relief for Novelties' violation of the Planned Manufacturing District ordinance ("PMD Ordinance"), and Count IV seeks civil penalties for each day that Novelties operated in violation of this ordinance. The last count seeks civil penalties for Novelties' display of an electric sign without the requisite permits and for operating without the requisite Public Place of Amusement License and general business license. Novelties has raised defenses to the City's counterclaim, including the defense that it is not bound by the PMD Ordinance because the zoning provisions of the Chicago Municipal Code do not provide for sufficient alternative avenues of communication for adult speech under the First and Fourteenth Amendments to the United States Constitution.

3. The City argued that Novelties lacked standing to challenge the City's former adult use ordinance because even a successful challenge would not redress Novelties' injury because they still would be in violation of the PMD Ordinance. The City also argued that Novelties' challenge is moot because the challenged provision is no longer law. Finally, the City argued that the challenged 1992 adult use provisions provide for sufficient alternative avenues of communication and met all constitutional requirements.

4. The Court's findings of fact and conclusions of law were entered on May 5, 1995 and are incorporated herein by reference.

5. The Court expressly finds that North Avenue Novelties is an adult bookstore as defined by Section 16-16-030 of the Chicago Municipal Code and that the plaintiffs and counterdefendants have operated this retail use in a Planned Manufacturing District since July 27, 1992.

6. The area within which Novelties operates their business is not, and was not in 1992, zoned for an adult use. Further, the area within which Novelties operate their business is not, and was not in 1992, an area in which any bookstore, variety store, or indoor amusement establishment -- adult or otherwise -- permitted to operate.

7. Based on the testimony, exhibits, and stipulations submitted by the parties, the Court finds by a preponderance of the evidence that in the spring and summer of 1992, the City's zoning ordinance did provide for an unknown number of sites, described as "numerous," which were available to locate an adult use.

8. The Court further finds by a preponderance of the evidence that in July of 1992, the City's Adult Use Ordinance in conjunction with the City's zoning ordinances presented plaintiffs and others with a reasonable opportunity to open and operate an adult bookstore in the City of Chicago.

9. The court further finds that if the City were to deny a property owner the right to locate a bookstore, video arcade, a novelty shop, or other general retail business in a PMD, such denial would not be capricious and arbitrary.

WHEREFORE, this Court orders:

A. Novelties, their general partners, limited partners, officers, directors, agents, servants, employees, attorneys and any other person acting on Novelties behalf are permanently enjoined from operating an adult bookstore or other adult use at their current location at 1308 West North Avenue in Chicago;

B. Novelties, their general partners, limited partners, officers, directors, agents, servants, employees, attorneys, and any other person acting on Novelties' behalf are permanently enjoined from operating any retail use at their current location in violation of the City's PMD Ordinance;

ENTERED: Harry D. Leinenweber /s/

DATED: June 19, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC., an Illinois corporation, and HAROLD GERSTEIN,	)	
Plaintiffs/Counter-Defendants,	)	CASE NO. 92 C 7023
v.	)	JUDGE LEINENWEBER
CITY OF CHICAGO, a municipal corporation,	)	
Defendant/Counter-Plaintiff.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiffs/Counter-Defendants, North Avenue Novelties, Inc. ("North Avenue") and Harold Gerstein ("Gerstein") (collectively "plaintiffs"), have brought this action seeking injunctive and declaratory relief against the City of Chicago ("City") from enforcing certain provisions of the City of Chicago Adult Use Ordinance, Code § 17-3.2, § 16-16-030 ("Adult Use Ordinance" or "Ordinance"). The City has counterclaimed seeking an injunction restraining plaintiffs from operating their business in violation of the ordinance, the City licensing laws, and the City zoning code. It also seeks assessment of penalties against plaintiffs for violating its zoning and licensing laws.

2. Plaintiffs are making a facial attack on the ordinance as being unduly restrictive in violation of the First Amendment of the Constitution of the United States. Plaintiffs have specifically stated that they are not making an "as applied" attack on the ordinance.

3. The parties stipulated that Gerstein and North Avenue operate an adult bookstore as defined in the Adult Use Ordinance and have been the consecutive owners of the store located at 1308 West North Avenue in Chicago Illinois. Sexually explicit books, magazines, videotapes, and novelties are offered for sale, rental and on premises viewing.[1]

4. North Avenue was incorporated on June 15, 1994. At the time it initially opened for business on July 27, 1992, and up to that date, North Avenue was apparently operated by Gerstein as a sole proprietorship.

5. The ordinance in effect at the time Gerstein opened his store in 1992 restricted the location of an adult bookstore, as defined in the ordinance, to real estate

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[1]Plaintiffs introduced exhibits 6 through 12 as evidence of the sort of sexually explicit materials they sell at North Avenue Novelties, in contrast to, for example, Playboy. (See plaintiffs' exhibit 5). A cursory glance reveals that these materials, using the test enunciated in the famous concurring opinion of Mr. Justice Stewart in *Jacobellis v. State of Ohio*, 84 S.Ct. 1676, 1683: ". . . I know it when I see it . . .," are hard-core pornography. Such materials are not protected by the First Amendment. *Roth v. U.S.*, 354 U.S. 476, 485 (1957). However, the City disclaims the nature of the materials sold by plaintiffs as a defense in this case. This concession makes an interesting paradox: plaintiffs seek to distinguish their operation from other newsstands and bookstores by the nature of the materials sold, *i.e.* pornography. The City, on the other hand, seeks to minimize the distinction.

classified under the Chicago Zoning Ordinance as C2-1 to C2-5, General Commercial Districts, and C3-1 to C3-7, Commercial Manufacturing Districts. The ordinance also prohibited the location of an adult bookstore or other adult use within 1000 feet, as measured between property lines, from an existing adult use, school, place of worship, or any property classified under the zoning ordinance for residential use.

6. The parties stipulated that the City's purpose in enacting the adult use zoning regulations was a desire to protect residents from adverse effects of adult uses, while providing those who desire to patronize such uses with a reasonable opportunity to do so. The conclusion as to the adverse effects of adult uses was based on negative experiences of the city of Chicago and other cities including Seattle, Washington, and Detroit, Michigan, showing that adult uses lead to increased criminal activity and degradation of the quality of the area in which they are located. The court finds therefore that the ordinance is aimed at the secondary effects of adult uses rather than the contents of the adult materials.

7. The Chicago of Chicago Zoning Ordinance provides for the creation of zoning districts called Planned Manufacturing Districts ("PMDs"). The purpose of designating land as a PMD is to preserve the City's premier industrial areas so as to enable Chicago to compete with the industrial parks of suburbia. The City targets PMDs for large expenditures from its capital budget to improve infrastructure. A further purpose of the PMD is to preserve land for industrial use by preventing conversion to inconsistent uses.

8. North Avenue is located in subdistrict 2 of PMD No. 2, known as the "Elston Corridor PMD".

9. The PMD ordinances provide for certain industrial uses and certain specified non-industrial and commercial uses felt to be accessory to industrial uses. In 1992, at the time Gerstein opened for business, the PMD specified 22 permitted uses. The non-industrial and commercial use regulations governing subdistrict 2 are the same as those allowed in an M1-3 Restricted Manufacturing District. Code, Title 17, at 194D-7 to 9. In 1992, neither a bookstore, a variety store, nor an indoor amusement establishment was specified as a permitted or supplemental use in either the PMD or a M1-3 Restricted Manufacturing District.

10. The Director of the Department of Planning and Development of the City of Chicago, Thomas P. Smith ("Smith"), testified that it is the duty of his office to interpret the zoning code. His office interprets the zoning code to intend that any use not listed as a permitted use to be a prohibited use. He explained that the non-industrial uses permitted in subdistrict 2 are of light intensity and non-obstructive and are service types for the convenience of industrial employees. From a planning point of view, the fewer the non-industrial uses the better because when commercial uses multiply there is increased pressure to convert an area from industrial to commercial.

11. Smith interpreted the word "schools" as used in the Adult Use Ordinance to include primary and secondary institutions and to exclude colleges, universities, and business schools. He interpreted the words "places of worship" as used in the Adult Use Ordinance to mean churches and to exclude chapels of social service institutions.

12. Plaintiff called Edwin Neal Thomas (Thomas), Professor of Urban Geography at the University of Illinois

at Chicago, as their expert witness. The parties stipulated that he is an expert in the subject of quantitative geography. Using computer techniques acceptable to the parties, he analyzed the Chicago zoning ordinance in effect in 1992 to ascertain the location and quantity of land available in the City of Chicago for adult use locations in 1992, and the theoretical number of adult uses that could be packed into these areas. He first determined the location and quantity of all land zoned C-2 and C-3. He then subtracted the land lying within 1000 feet of an existing school or house of worship. From the results, he prepared three tables: No. 1, to include the land available using the City's list of churches and schools, excluding colleges, universities, adult schools, and social service institutions; No. 2, to include the land available using the City's list of churches and schools, including the I.M. Temple Reading Room[2]; and No. 3, including plaintiffs' list of churches and schools, which included colleges, universities, adult schools, and social service institutions with chapels. Using table No. 1, 548.33526 acres available were shown to be available for adult uses, table No. 2, 533.14103 acres available, and No. 3, 273.27624 acres available. He also computed, using a geometric packing theory, a theoretical upper limit to the total capacity question. He concluded that between 22 and 56 sites would be available because of the 1000 foot requirement between adult uses.

13. The City called Smith as its expert. The parties stipulated he possessed appropriate expertise to estimate

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[2]It was stipulated during the course of the trial that The I.M. Temple Reading Room is a place of worship as defined in the Adult Use Ordinance. This has the effect of reducing the land available for adult uses by approximately 16 acres. Thus Thomas' Table No. 2 is the applicable table rather than Table 1.

the amount of land available in the City for adult uses and that he employed the same methodology as Thomas. He concluded that there was approximately 532 acres available for adult uses under the ordinances in effect in 1992. Smith's total differed slightly from the total shown on Thomas' list No. 1 because he excluded land occupied by highways and waterways and included certain lands that had been reclassified C-2 and C-3 by the City after the zoning map used by Thomas was published.

14. The parties stipulated that in July, 1992 there were 35 adult uses operating in the City. It was also stipulated that there were approximately 50 video stores operating in the City in zones other than C-2 and C-3 that had separate sections devoted to the sale or rental of adult videos. The Adult Use Ordinance defines an adult bookstore to include stores that have a "segment or section devoted to the sale or display of [adult] material." However Smith testified that the City does not and has never considered such video stores to be adult bookstores. In determining whether a use is adult, the city considers the following non-exclusive list of factors; the presence of video preview booths, the exclusion of minors, the percentage of adult sales as compared to non-adult sales, form of advertising, signage, displays, and whether the establishment considers itself an adult use. Moreover the presence of an adult use outside of a C-2 or C-3 zoning district would not necessarily mean the business was illegally located. To determine whether the use was legal a so-called nonconforming use a zoning administrative officer considers a variety of factors, including the date that the business began operation and whether it was a legal use under the zoning law applicable at that time.

15. The City's zoning process is simple: If a business can find a properly zoned location, and if the building codes

are complied with, the City will issue an occupancy permit. There is no discretion to deny it.

16. Gerstein hired an adult use consultant, Thomas Harris ("Harris"), in the spring of 1992, to conduct a search for a location for a proposed adult bookstore to be owned and operated by him. Harris is not an attorney and is not a zoning or marketing expert. He has acted as a consultant for 6 to 14 adult businesses of which Gerstein was the only one located within the City of Chicago. His search consisted of a tour of some of the major geographic areas available for adult uses. He admitted that he found numerous sites which appeared to be available for adult uses in the various C-2 and C-3 districts he toured. However, he made no inquiries of the owners of any of these sites as to their availability. He also made no inquiries of the City zoning officials with respect to the legality of any site. In spite of the apparent availability of properly zoned sites he, nevertheless, recommended to Gerstein that he locate his business at the North Avenue site even though he knew that the site was located in a PMD, which he knew did not permit adult uses. He testified that the North Avenue site was "perfect for an adult book store" except that it lacked sufficient off street parking.[3] When asked why he recommended the North Avenue site in spite of the zoning problems, he testified that Gerstein's attorney, Michael Null, who is representing Gerstein in this case, advised him that in his opinion the Adult Use Ordinance was probably unconstitutional and,

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[3]The factors important to the location of an adult bookstore are: not too close to other commercial uses, a commercially active area with good traffic flow, the size and layout of the building, and adequate parking, particularly behind the store.

therefore, he need not restrict his search to properly zoned sites.

17. In January, 1993, two adult uses opened for business in properly zoned sites: The Doll House, located near plaintiffs' bookstore at 1531 West Kingsbury, and Erotic Warehouse, located west of the loop at the intersection of Randolph and Elizabeth Streets. These operations were issued all occupancy permits and licenses necessary to open for business, and continue to operate at these locations to this day.

18. Based on the above testimony, exhibits, and stipulations, the court finds by a preponderance of the evidence that in the spring and summer of 1992, the City's zoning ordinance did provide for an unknown number of sites, described as "numerous" which were available to locate an adult use.

19. The court further finds by a preponderance of the evidence that in July of 1992, the City's Adult Use Ordinance in conjunction with the City's zoning ordinances presented plaintiffs and others with a reasonable opportunity to open and operate an adult bookstore in the City of Chicago.

20. The court further finds, considering the reasons Smith gave for severely limiting non-industrial uses in PMDs and the other evidence in the case, that if the City were to deny a property owner the right to locate a bookstore, a video arcade, a novelty shop, or other general retail business in a PMD, such denial would not be capricious and unreasonable.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. § 1331, 1343(a),(3) and (4), and 1367(a). Venue is proper in this district under 28 U.S.C. § 1391(b).

2. The first issue the court must consider is whether plaintiff has standing to contest the validity of the Adult Use Ordinance. On November 14, 1994, the court granted the City's motion for summary judgment on the basis that plaintiffs had not established that they had standing to bring this suit. The court noted that the Constitution limited jurisdiction of federal courts to "cases and controversies." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992); *Harp Advertising v. Village of Chicago Ridge*, 9 F.3d 1290, 1292 (1993). An "essential" part of the "case or controversy" requirement is standing. The irreducible constitutional minimum for standing consists of three elements. First, the plaintiff must have suffered an "injury in fact." Second, the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely that the injury will be redressed by a favorable decision. *Id.* This court held at that time that while plaintiffs could establish the first two elements, they failed to establish the third. The court stated that even if it agreed with plaintiffs and found the Adult Use Ordinance unconstitutional, the provisions of the PMD would still not allow them to locate at the North Avenue address.

On January 19, 1995, the court reconsidered the summary judgment on the basis that there was a valid question whether an attempt to distinguish between defendant's use and other permitted and supplementary uses allowed in subdistrict 2 of the PMD No. 2 would be "capricious and unreasonable" under the equal protection

clause. See *Cohen v. City of Des Plaines*, 8 F.3d 484, 494-5 (7th Cir. 1993).

The evidence has proved that the purpose of the PMD is to promote industrial development and to allow only those commercial uses deemed to be accessory services to industrial employees. The planning principle involved is to avoid increasing commercial uses in a PMD so as not to create pressure to convert the area from industrial to commercial. It is clear that a city may use the zoning ordinance as an exercise of its police power. The City's decision to restrict commercial uses to those deemed accessory to and desirable in a PMD was rational. Even if it is considered "fairly debatable, the legislative judgment must be allowed to control." *Euclid v. Ambler Realty Co.*, 47 S.Ct. 114, 118 (1926) quoted in *Cohen*, 8 F.3d at 495. Since, based on the foregoing, the court has found that denial of the right to open a bookstore, arcade or novelty shop in a PMD would not be capricious and unreasonable, a decision of this court holding the Adult Use Ordinance unconstitutional would not redress plaintiffs' injury. Therefore, the court finds that plaintiffs lack standing to bring this suit.

3. Even if the court found that plaintiffs had standing to contest the Adult Use Ordinance, they would fail on the merits.

The Supreme Court first had occasion to apply the First Amendment to sex materials in *Roth v. U.S*, 77 S.Ct. 1304 (1957). The case established that sex and obscenity are not synonymous. The former is protected and the latter is unprotected by the First Amendment. Distinguishing between the two has been a thorny problem and has led to a number of tests and guidelines. *See, e.g., Miller v. California*, 93 S.Ct. 2607 (1973). Efforts to eradicate

obscene materials has been doomed to failure due to the stringency of the substantive and procedural hoops dictated by the First Amendment. As a consequence, some municipalities have sought to contain these materials rather than eradicate them. A popular way has been through application of zoning laws. *See, e.g., Young v. American Mini Theatres*, 96 S.Ct. 2440 (1976)(ordinance adopted requiring adult uses to be dispersed), and *Renton v. Playtime Theatres, Inc.*, 96 S.Ct. 2440 (1986)(ordinance adopted requiring adult uses to be concentrated). However, the Supreme Court in Renton cautioned against efforts to eradicate under the guise of zoning laws because to do so would be a clear violation of the First Amendment. However, if the ordinance was aimed at secondary effects of adult uses rather than the content of the materials, it will be classified as "content neutral" and thus the City will be spared the heavy burden of overcoming the presumption of First Amendment violation. Instead, the case will present the question whether "the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." 106 S. Ct. at 930. In other words, a community must "refrain from effectively denying [plaintiff] a reasonable opportunity to open and operate an adult [bookstore] within the city . . .." 106 S. Ct at 932.

The City's purpose in enacting its adult use zoning regulations are certainly equal to the interest expressed by Detroit (*Young v. American Mini Theatres, Inc.*, 96 S. Ct. 2440, 2453 n. 34) and the City of Renton (*Renton* 106 S. Ct at 931), and are conceded by the plaintiffs as such. This leaves the question of whether the City legislative scheme has left "reasonable alternative avenues of communication" which appears to be another way of putting the question of whether this means adopted or narrowly tailored to serve

the governmental interest involved *Graff v. City of Chicago*, 9 F.3d 1309 1321 (7th Cir 1993).

The first issue to be addressed is who has the burden of proof on the issue of reasonable opportunity? The Fourth Circuit seems to indicate that the burden is on the plaintiff when it stated its analysis with a "strong presumption of constitutionality" because zoning and adult use ordinances are legislative acts. *11126 Baltimore Blvd. v. Prince George's County, Md.*, 886 F.2d 1415, 1421 (4th Cir. 1998). However, in the Seventh Circuit, the law may be otherwise. In *Graff*, the City of Chicago did not dispute plaintiff's assertion that burden of proof on the reasonableness of the ordinance's time, place and manner restrictions were on the City[4]. Apparently, based on this concession, the Seventh Circuit assumed that it was. 9 F.3d at 1322. However, the two cases relied upon by plaintiff in *Graff* (*City of Los Angeles v. Preferred*, 106 S.Ct. 2034, 2038 (1986), and *Speiser v. Randall*, 78 S.Ct. 1332 (1958)), do not say what he says they say. They appear to say that the government has the burden of proving whether an ordinance or statute regulating speech is content neutral. However, once this has been proved the burden would appear to shift to the contestant because the ordinance or statute would be presumed valid as an exercise of police power.

However, even assuming that the City has the burden of showing that adult use purveyors in 1992 had a reasonable opportunity to open for business in Chicago, based on the court's Findings of Fact above, it has done so.

The parties hotly disputed the definitions of "school" and "places of worship" because the parties agree, using the

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[4]As is obvious, the City does not make the same concession here.

City's restricted definitions, that the amount of land doubles. However, using plaintiffs' expansive definitions still leaves approximately 270 acres of City land in various locations available for adult uses. Smith and Harris testified that there were numerous sites available. The City produced evidence that within one year of plaintiffs' opening two adult uses legally in the City, one near plaintiffs'. Paul Woznicke, the City zoning administrator, testified that his office received only 4 to 5 inquiries a year concerning possible locations for adult uses. There was no evidence that any person was unable to find a legal location during this period. Harris testified that he made very little effort to locate a legal site, other than to make a sidewalk survey of the area which showed numerous available sites. He recommended the North Avenue location, knowing it was not properly zoned, on the basis of a legal opinion that the Adult Use Ordinance was probably unconstitutional rather than non-availability.

The amount of acreage, whether 270 acres or 540 acres, or .187 percent or .375 percent of the total area of the city, standing alone is largely irrelevant.[5] It must be compared to something, such as how much land is necessary to accommodate the demand for sites. The record is devoid of any marketing studies or other evidence pertaining to the demand for adult use sites in 1992 or pertaining to the demand for adult materials and the number of stores it would take to meet it. The constitution does not require that a city make an amount of land available for adult uses that is greater than the demand to provide a reasonable

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[5]So is the number of uses that could be packed into the available area, absent a showing that a reasonable amount of sites were not available considering the demand.

opportunity to open.[6] In fact, in *Renton*, the lower court found that "practically none" of the land supposedly made available by the Renton ordinance was appropriate for the location of an adult theater. The Supreme Court, nevertheless, was unsympathetic and told the prospective adult uses that they "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." 106 S.Ct. at 932. In contrast, the court here has specifically found that the City ordinances have made numerous sites available for adult uses. The court, therefore, finds that the City of Chicago Ordinance is not so restrictive as to violate the First Amendment of the Constitution of the United States.

4. The court finds the issues in favor of the City of Chicago and against the plaintiffs on plaintiffs' complaint. Judgment is entered in favor of the City and against plaintiffs.

COUNTERCLAIM

The court having found that plaintiffs/counter-defendants' operation of an adult use at 1308 West North Avenue is in violation of the Chicago of Chicago zoning ordinances, thus finds the issues in favor of the City and against plaintiffs. The City is entitled to an injunction to prevent violation of its zoning ordinance. 65 ILCS 5/11-13-15; *City of Chicago v. First Nat'l Bank of Skokie*, 682 N.E.2d 682 (lst Dist. 1972). The City is also entitled to

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[6]In fact the parties have stipulated that a year later, in 1993, the City amended its adult use ordinance to add more zoning districts for location of adult uses. In 1994, it did so again. This would lend credence to the City's position that it is not trying to squeeze adult uses out of existence.

penalties for operating in violation. The court will set hearing on the penalties at a later date.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

DATED: 5/5/95

Be It Ordained by the City Council of the City of Chicago:

SECTION 1. That Chapter 194A, the "Chicago Zoning Ordinance," of the Municipal Code of Chicago is hereby amended in Section 3.2 by adding a new definition in proper alphabetical sequence, and in Sections 9.3-2, 9.3-3 and 9.4-2 by deleting the language in brackets and adding the language in italics, as follows:

3.2

* * * * *

Adult Uses. The phrase "adult uses" means adult book stores, adult motion picture theaters, adult mini motion picture theaters, adult entertainment cabarets, as defined below, or similar establishments.

a. An adult book store is an establishment having as a substantial or significant portion of its stock and trade books, magazines, films for sale or viewing on premises by use of motion picture devices or any other coin-operated means, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities," or "specified anatomical areas," or an establishment with a segment or section devoted to the sale or display of such material.

b. An adult motion picture theater is an enclosed building with a capacity of 50 or more persons used regularly and routinely for presenting material having as a dominant theme material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

c. An adult mini motion picture theater is an enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas," for observation by patrons therein.

d. An adult entertainment cabaret is a public or private establishment which, is licensed to serve food and/or alcoholic beverages, which features topless dancers, strippers, male or female impersonators, or similar entertainers.

e. The phrase "specified sexual activities" in connection with adult uses means:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

f. The phrase "specified anatomical areas in connection with adult uses means:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state even if completely and opaquely covered.

* * * * *

9.3-2 Permitted Uses -- General Commercial Districts.

* * *

B. The following uses are permitted in the C2-1 to C2-5 Districts inclusive:

(1) Any use permitted in the Cl-l to Cl-5 Districts inclusive -- as set forth in Section 9.3-1B unless otherwise set forth or superseded hereinafter.

(2) Contractor's Yards.

(3) Gas Utility Service Substations

(4) Motor Vehicle Sales.

(5) Hotel and Motels.

(6) Adult Uses, provided that, as measured between property lines, no such Adult Use shall be located

a. Within 1,000 feet of another existing Adult Use; nor

b. Within l,000 feet of any Zoning District which is zoned for Residential Use; nor

c. Within 1,000 feet of any pre-existing school or place of worship.

* * * * *

9.3-3 Permitted Uses -- C3-1 to C3-7 Commercial-Manufacturing Districts.

* * *

B. The following uses are permitted in the C3-1 to C3-7 Districts inclusive:

(1) Any use permitted in the Cl-l to C1-5 Districts inclusive -- as set forth in Section 9.3-1B -- unless otherwise set forth or superseded hereinafter.

(2) Any Production, Processing, Cleaning, Servicing, Testing, or Repair of Materials, Goods, or Products, subject to the conditions imposed under 9.3-3A.

(3) Hotels and Motels.

(4) Adult Uses, provided that, as measured between property lines, no such Adult Use shall be located,

a. Within 1,000 feet of another existing Adult Use; nor

b. Within 1,000 feet of any Zoning District which is zoned for Residential Use; nor

c. Within 1,000 feet of any pre-existing school or place of worship.

* * * * *

9.4-2 Special Uses -- C2-1 to C2-5 General Commercial Districts.

[(1)] Any special use allowed in C1-1 [and] *through* C1-5 Districts, inclusive.

[(2) In C2-4 Districts, Adult uses, as defined in Chapter 194C of the Municipal Code of Chicago.]

SECTION 2. That Chapter 194C, Section 4 of the Municipal Code Of Chicago is hereby amended by renumbering all of its sections in accordance with the provisions of Chapter 1 of this Code and by deleting the language in brackets and adding the language in italics as follows:

[Section 1] 194C-1. * * *

[Section 2] 194C-2. * * *

[Section 3] 194C-3. * * *

[A] *a.* * * *

[B] *b.* * * *

[C] *c.* * * *

[D] *d.* * * *

[E] *e.* * * *

[F] *f.* * * *

[SECTION 4.] 194C-4. Regulated Uses. Regulated Uses include all Adult Uses which include, but are not limited to the following:

Adult Book Store.

Adult Motion Picture Theater.

Adult Mini Motion Picture Theater.

Adult Entertainment Cabaret.

[4.1] 194C-4.1. Adult Uses shall be permitted subject to [the following] *zoning* restrictions as provided in Chapter 194-A[:].

[(1) No such Adult Use shall be allowed within 1,000 feet of another existing Adult Use.

(2) No such Adult Use shall be located within 1,000 feet of any Zoning District which is zoned for Residential Use.

(3) No such Adult Use shall be located within 1,000 feet of a pre-existing school or place of worship.

(4) No such Adult Use shall be located in any Zoning District except a C-2 zoned area.]

[SECTION 5] 194C-5.

[(a)]. * * *

[(b)]. * * *

[(c)]. * * *

[(d)]. * * *

[(e)]. * * *

[(f)]. * * *

[(g)]. * * *

[(h)]. * * *

[(i)]. * * *

194C-5 * * *

194C-5.2 * * *

[SECTION 6] 194C-6. * * *

[6.1] * * *

[6.2] *194C-6.1.* * * *

[6.3] *194C-6.2.* * * *

[SECTION 7] 194C-7. * * *

[7.1] * * *

[7.2] 194C-7.1. * * *

SECTION 3. This ordinance shall take effect from and after its passage.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NORTH AVENUE NOVELTIES, INC., and HAROLD GERSTEIN,	)	
	)	Docket No.
Plaintiffs/ Counter-Defendants,	)	92 C 7023
	) Chicago, Illinois	
v.	) April 19, 1995	
	) 10:00 o'clock	
CITY OF CHICAGO, a municipal corporation,	) a.m.	
Defendant/ Counter-Plaintiff.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D. LEINENWEBER

* * * * *

Edwin Thomas -- Direct Examination.

Q If we did that, if we accepted that method or that protocol with using Model 1, that is, sliding it around to get the absolute maximum number of points, what would that tell us?

A That would tell us, in a theoretical and abstract way, the largest number of adult uses that could be located within a particular zoning district and, if we did it for all

the zoning districts within the context of their locations, then it would ultimately allow us to sum up the largest number of theoretical adult uses.

Q If we did that and we got a sum of the largest number of theoretical adult uses, can you tell us how that could be expected to relate to the number of actual adult uses that could actually fit on actual land?

A It would be larger than --

Q Which would be larger?

A The theoretical number would be larger than the actual number.

Q Again, just for the record, could we specify some of the reasons why the prediction would be larger than reality?

A Yes.

Q What are those?

A First of all, the lot size of a particular adult use would extend in one direction or another the spacing so that the pattern would not be any more a perfect equilateral triangular lattice but some points would be further apart than others.

In addition to that, where we consider the second point, it's space-occupying, as well. We could boil this down to Point No. 1 being the actual space of the lot on which an adult use is located are not taken account of in the theoretical model. No. 2, I think that we have to show some cognizance of the street grid. So that certain adult uses

that are small residuals in the center of large areas that have, in fact, no road to them probably would not be legitimately considered an adult use in the practical sense of the word.

Q Even though in theory you could put a point there and count it?

A Yes.

Q When we think of this -- again, we are returning to the assumption that the adult use occupies a point and that there is a circle of one thousand-foot radius around. Is there any effect that the actual size of the lots that lie along the circumference of that circle would have on the analysis?

A Well, if any lot touched by the circle is in fact in the area that is prohibited from other adult uses, then that would enlarge the acreage to include that total area of the irregular shape made up of all those lots that were garnered by being touched by the radius.

Q In other words, if we return to the assumption that an adult use located in the middle of a very large regular area but take into account the actual lot lines, you are saying, I take it, that this thousand-foot circle would no longer be a circle but would be some irregular shape that would have additional area contributed by lots that were touched in part but not completely by the circumference of that original circle, is that what you are saying?

A That is correct.

THE COURT: Another example. Let's say you had a one thousand square foot parcel of land which was zoned

C2, not affected by a church or a school. Theoretically you could put four, I mean, at the four corners?

THE WITNESS: Yes.

THE COURT: But, if one is located in the middle, then you would only be able to put one?

THE WITNESS: No.

THE COURT: I am saying, an isolated parcel would have to be --

THE WITNESS: Sir, it is a matter of the shape of that parcel. If, it were a thousand feet on a side and if it were square, then we could take out that circle but then we could put, in fact, five there. Because there would be the little area of the corner that was not covered by that circle.

MR. LEE: So, you can see, your Honor, he is really packing them in.

THE WITNESS: It is tricky because shape is very, very important. If you think of length and think of something that, in theory, has no [width], then, if it is going to have a thousand feet, an area of a thousand feet, it could be very, very long and you could get an infinite number of points in it. So, shape is important. Location next to other things is important.

BY MR. LEE:

Q Professor Thomas, let me follow up on a question that his Honor asked. Let's return to this area that is a perfect square, one thousand feet on a side. Let's say it is situated out by Lake Calumet somewhere, and it happens

to be land that contains only three lots. They are situated such that all the lots are adjacent to each other. Then how many adult uses could you fit in that. area consistent with the dictates of the zoning ordinance that the thousand foot restriction is measured from property line to property line?

A If I envision the map of this correctly, just one.

Q So that lot lines, actual lot lines, might have a dramatically reducing effect. In this case it reduced from a theoretical maximum of five down to one, is that correct?

A Yes.

Q Now, when we talked about this Model l, -- this densest possible packing, is it realistic -- is it likely that actual adult uses would rigidly follow this equilateral triangular native as they fill in an area?

A In my experience in similar but not identical things that perfect equal lateral triangular lattice is just never encountered.

Q Again, departures from this Model 1, equilateral triangular lattice, would the effect on the number that could fit in a given area of departures from that always be in fact in one direction?

A Yes.

Q Which direction would that be?

A The actual number would always be le[ss] [than] the theoretical number as long as the fundamental spacing were the same.

Q Now, you said that you could take either Model 1 or Model 2, a lattice drawn on either the Model 1 or Model 2 analysis and slide it around on a map in order to get the most possible theoretical points in an area, is that correct?

A Yes.

Q What if you did it another way with either model? What if you slid it around in order to get the least number of points in an area that would still consistent with the lattice as it is structured? Is that another possible way of sliding the lattice around on the map?

A Sure.

Q If you did that, would there, under those circumstances, be room for any more adult uses?

A No.

Q Would the numbers that results from that kind of sliding mechanism be -- how would they relate to the numbers that would result from the first sliding protocol that you mentioned?

A Those numbers -- the second procedure would result in smaller numbers.

Q Now, would even those numbers suffer the results of the same simplifying assumption that you mentioned, that is, the lack of taking account finite lot size, the lack of street access and worrying about the actual street structure -- would the numbers, even those lower numbers, suffer from those same problems?

A Yes.

Q Would they likely, also, be high in terms of their relation to the actual adult uses that might locate on actual lands?

A They would be high.

Q Now, Professor Thomas, with respect to each of the lists that you have used, each of the lists that you have prepared and the maps that relate to the amount of land available on analyses of each of the lists, have you in fact made an assessment of how these various models and these various mechanisms, these various protocols for sliding the lattice around on the map -- have you made an assessment about the outcome, the theoretical outcome, of those counts?

A Yes.

Q Now, Professor Thomas, I would like to ask you about the numbers that resulted from the following case.

MR. SCHMETTERER: Your Honor, I am not sure if Professor Thomas is reviewing any documents following these questions. If he is, I would like to see what he is reviewing.

BY MR. LEE:

Q Professor Thomas, will you need to refer to any documents to refresh your recollection with respect to your results?

A To the results? Yes, I will.

Q Very well. I show you --

MR. LEE: May I have a moment, your Honor?

THE COURT: All right.

(Brief pause.)

BY MR. LEE:

Q I show you what I have marked for identification as Plaintiffs' Exhibit No. 4.

(Exhibit tendered to the witness.)

BY MR. LEE:

Q I ask whether you recognize that document?

A Yes,I do.

Q Who prepared it?

A I prepared it.

Q Again, like some of the others, is that in fact a group exhibit consisting of several pages?

A Yes, it is.

Q Could you describe to us what this document shows and how each of the pages differ?

A Each of the pages differ in that they pertain to the zoning districts that were available for adult uses on List 1, List 2 and List 3.

Q Now, that is the only difference between the pages?

A Correct.

Q Now, let's focus on the first page. Can you tell us what the first page says about List 1?

A On the first page four variables are shown. There is a name variable, a Count 1 variable, a Count 2 variable, a Count 3 variable and a Count 4 variable.

Q Let's start with the name variable. What does that represent?

A That is the name of the zoning district. The name is established by, first, whether the type of district was C2 or C3, and then after the first two characters, the next two or three characters specify a page in the zoning atlas where the zoning district was found, and then there is a suffix there that is Dot 1 or Dot 2 or whatever, and that suffix indicates that this was the first zoning district on the page that I digitized, or the second zoning district, or the thirds fourth or how many ever I had on that particular page.

Q Now, these names that you talked about, are these names that the City has given to these zoning districts?

A No.

Q Who designated those names?

A I designated these names so I could keep track of what I was doing.

Q You designated them according to the rules you just gave us?

A Yes. I would like to go on and amplify that rule

slightly.

Q Very well.

A Where there was a zoning district that was cut by a church or a school in such a way that it became two zoning districts, it still had the same name. I didn't add a second suffix to say that this is 101.1A and 101.1B. So that you may see in here some repetition of names. This is because of the division of zoning
districts.

Q So, these names that are listed in the first column are ways that you and your computer program kept track of the different districts that you were working with?

A Yes.

Q Now, let's talk about Count 1. What does that represent in terms of the packing model and the protocol that we have discussed in the past few minutes?

A This was what we referred to as Model 1. It was the most densely packed arrangement with the smallest spacing between points representing adult establishments.

Q What does count 1 represent with respect to that sliding protocol that we talked about?

A Here the arrangement of the lattice was such that I got,
as best I could, the maximum number of adult use points in each zoning district that I considered, considering where those zoning districts were located.

Q So, realizing that we are still speaking theoretically

here and realizing that these numbers may all be high in terms of reality, will Count 1 generally be the highest possible count to pack even these theoretical points into a particular area?

A Yes.

Q How does Count 2 differ from Count 1?

A Count 2 used the same lattice. So, we are still packing densely.

Q That is the one we called Model 1?

A That's Model 1.

Q Okay. That is how it is the same. How is it different?

A It differs in that I located points within zoning districts so that the fewest number that met the rules of the lattice could be fit in there.

Q So, that was that second way of sliding the lattice around that I asked you about?

A Correct.

Q Now, still, when you use that, is it still true that you couldn't put another adult use in consistent with the thousand-foot separation requirement?

A That's correct.

Q So, it is still giving us another kind of maximum, is that correct?

A That's correct.

Q Because of the difference in the sliding rule that you use, would you expect, as a theoretical matter, Count 2 to always be lower than Count 1?

A Yes.

Q Let's talk about Count 3. How was Count constructed?

A Count 3 followed all the rules for Count 1 except that the lattice points were more distantly spaced. In no instance were they beyond the thousand feet. That is given. But instead of being at that five hundred foot spacing, these are spread out a little bit so that each place has what you might think of as a somewhat larger trade area or somewhat larger dominating area but still it is just the largest it could be and still at have no other adult uses get into that area.

Q So, is that what you described before, that I designated as Model 2?

A That is correct.

Q Now, again, you said it was similar in all other respects -- that Count 3 was similar in all other respects to Count 1. Does that mean that you adopted a sliding rule that maximized the number of those Model 2 lattice points that you could fit in an area?

A Yes, that is exactly what I did.

Q Finally, Count 4.

A Count 4 is comparable to Count 2. If I could get two points in by locating something on the diagonal of a square, if I located something like staying in the center of the square and only could get one in, then that was the result of Count 4.

Q So, in other words, Count 4 is something very similar, in a theoretical sense, to the example that his Honor put of an area that might be large enough to hold more than one, if they were at the edges, but is small enough so that one in the center could dominate and exclude all others?

A That is exactly right.

Q Now, again, even this Count 4 number, is that the number -- sticking within the realm of theoretical points -- is that the number you would expect to be lowest of all the counts?

A Within the theoretical concepts, yes.

Q Now, even this number, how might that relate to actual adult uses on actual land?

A It's got to be high.